

In the United States Bankruptcy Court  
for the

Southern District of Georgia  
Brunswick Division

FILED  
at 11 O'clock & 33 min A M  
Date 5/1/01

MICHAEL F. McHUGH, CLERK  
United States Bankruptcy Court  
Savannah, Georgia

In the matter of:

BETTY L. REGISTER

Debtor

Chapter 13 Case

Number 00-20819

**MEMORANDUM AND ORDER**  
**ON MOTION FOR RECONSIDERATION**

Creditor asked the Court to reconsider confirmation of the Debtor's plan which occurred on January 10, 2001, at a hearing at which Southeastern Bank ("Bank") failed to appear. The Bank's counsel represented to the Court that the Bank had received no notice of that hearing and the Court therefore grants the Motion to Reconsider. What remains is the Bank's Objection to Confirmation. Debtor's plan provides in paragraph six as follows:

The following collateral will be surrendered to satisfy the creditor's claim to the extent shown:

<u>Creditor</u>	<u>Collateral</u>	<u>Amount of Claim Satisfied</u>
Southeastern Bank	Boat	\$3,914.00

The issue surrounds the fact that the Debtor is unable to deliver physical possession of the boat to the Bank. Her explanation requires an understanding of the transaction between

the parties.

### FINDINGS OF FACT

Debtor appeared at the Bank in November of 1999 with a friend of her daughter's by the name of Jim Geiger. Geiger was already a borrower at Southeastern Bank and was in some financial distress. He owned, but had not previously pledged this 21 foot inboard/outboard boat to the Bank. Apparently in an effort to borrow funds to deal with his financial problems, he offered the boat as collateral, but was turned down for an additional loan. He then approached Ms. Register, through her daughter, to see if she would borrow the money from the Bank and pledge the boat to secure it. She agreed to do so and in November of 1999 the two of them went to the offices of the Bank and met with the loan officer, Chris Harper. A bill of sale conveying Mr. Geiger's interest in the boat to Ms. Register was executed by Mr. Geiger.

The Debtor then signed a bill of sale, security agreement, and a UCC financing statement and delivered it to the Bank to provide it with a security interest in the boat. Chris Harper, the loan officer, delivered a check in the amount of approximately \$3,500.00 payable jointly to Geiger and to Ms. Register. She endorsed the check over to Geiger who then paid off his unsecured note of \$1,100.00 and kept the remainder of the proceeds. Ms. Register testified that she never owned or saw the boat nor had it in her possession, but clearly, because of the execution of the bill of sale, she became the owner in November of 1999.

Payments were made on the note by Mr. Geiger for a time, but by March of 2000 the Debtor became concerned about the likelihood of Geiger's future payments and discussed this with Harper, the banker, who told her that she had ownership of the boat and could hold it to protect herself. Harper testified that up until that point he did not know that she had not intended to and had not taken possession of the boat. In light of the plan provisions the Bank attempted, but has been unable to locate, the boat as Mr. Geiger has apparently hidden it and, based on the Debtor's testimony, may now have sold it. Geiger has communicated to the Debtor's daughter that he is able to make small monthly payments and apparently understands the legal repercussions if it is established that he sold secured collateral without accounting for the money to the Bank.

The Debtor previously made good faith efforts to locate the boat and at one time thought she had located it in order to assist the Bank in taking possession of it, but the boat was moved before any action could be finalized. Southeastern Bank objects to confirmation of the plan providing that the boat be surrendered when the Debtor is unable to deliver physical possession of the collateral to the Bank.

The Debtor takes the position that her plan can be confirmed because she proposes to, and indeed will surrender, any remaining interest in the boat that she has to the Bank to let it exercise its repossession rights. The issue is whether this provision can be approved under the provisions of 11 U.S.C. § 1325(a)(5)(C) which provides that a plan can be confirmed if, in respect to secured claims of Southeastern Bank, "the Debtor

surrenders the property securing such claim to such holder.”

### CONCLUSIONS OF LAW

Based on a strict literal interpretation of the language found in §1325(a)(5)(C), it appears that a debtor providing for surrender must, in fact, surrender the property and not merely the debtor’s interest in the property. However, if the Bank knowingly entered into a fictitious or sham transaction to accommodate a non-creditworthy borrower under these circumstances, and if it was known that the Debtor never had possession and never intended to take possession of the boat, it might well be permissible to confirm a plan in which physical possession is not delivered by the Debtor directly to the Bank. Here, although the Debtor testified otherwise, I conclude the evidence is insufficient to establish that the Bank knowingly participated in a transaction that could be deemed a sham. The Bank knew that the intention was for Geiger to repay the note to the Bank, but a bill of sale to the boat, and insofar as the Bank knew, actual physical possession and custody of the boat, was delivered to the Debtor.

The wording of 1325(a)(5)(C) provides that confirmation may occur if “the debtor surrenders the property securing such claim to such holder.” 11 U.S.C. §1325(a)(5)(C). Black’s Law Dictionary states that to surrender is “to give back, yield, render up, restore, the giving up by a bankrupt of his property to his creditors or their assignees.” Black’s Law Dictionary 1295 (5<sup>th</sup> Ed. 1979). By definition, then, surrender requires an affirmative act by the Debtor, more than a mere abandonment of interest.

Furthermore, "abandonment differs from surrender in that surrender requires an agreement." Black's Law Dictionary 2-3 (5<sup>th</sup> Ed. 1979).

"The operative phrase in section 1325(a)(5)(C) does not end with the word 'property' but continues with the words 'to such holder,' making it plain that a debtor must at least tender possession or control of the collateral to the creditor, without regard to whether the creditor's consent is a further condition. Merely telling the creditor where it can find the collateral is not a surrender 'to such holder.'" In re Smith, 207 B.R. 26, 30 (Bankr. N.D.Ga. 1997). See In re Robertson, 72 B.R. 2 (Bankr. D.Colo. 1985)(holding that "surrender" as used in 1325(a)(5) requires return of collateral and relinquishing control to the holder of a claim). In this case, then, the Debtor's failure to deliver physical possession or control of the boat to Southeastern Bank, despite her good faith efforts to assist the bank in the location of the boat, does not meet the minimum requirements set forth in 11 U.S.C. §1325(a)(5) for surrender. I therefore conclude that confirmation of Debtor's plan is denied.

### ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Debtor physically surrender the collateral to the Southeastern Bank, or file a Modified Plan within fifteen (15) days from entry of this Order. Upon failure to do so, the case will be dismissed.

FURTHER ORDERED that Movant's request for an award of attorney's fees will be ruled upon by separate order.



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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 30 day of April, 2001.